

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAYMON GREGORY,	§	
	§	No. 179, 2011
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 1002002739
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: September 28, 2011

Decided: October 19, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

ORDER

This 19th day of October 2011, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Daymon Gregory (“Gregory”), the defendant-below, appeals from a Superior Court final judgment of conviction of Possession With Intent to Deliver Marijuana, Maintaining a Dwelling for Controlled Substances, and Possession of Drug Paraphernalia. On appeal, the defendant claims that the trial court erred by denying his request for a mistrial based on prosecutorial misconduct consisting of allegedly prejudicial statements made during summation. Because the prosecutor’s statements were either legally proper or otherwise harmless error, we affirm.

2. On February 4, 2010, while Gregory was in an upstairs bedroom at 508 North Spruce Street in Wilmington, the police executed a search warrant on the premises. Detective Matthew Hazzard testified that Gregory told police under questioning that marijuana could be found in the dresser of his bedroom in that building. Police then searched the room Gregory described and located the marijuana. They also found an ID and receipt in Gregory's name, two boxes of clear sandwich bags, four bags of marijuana, several bags with marijuana residue, a scale and over one thousand dollars cash. Gregory was later indicted on three drug related charges, including Maintaining a Dwelling for Controlled Substances.

3. Gregory disputed the police account. He testified that the room in question was his brother's, not his, and that on the day of the search he was spending time with his brother, who had left the building to go to a store shortly before the police arrived. Gregory acknowledged that he was smoking marijuana in the room that day, but claims that he never told police that the room was his. Rather, Gregory claims, he told the police that they would probably find marijuana in his brother's room if they searched it. A neighbor who occasionally wrote out rent receipts testified that he had done so for Gregory's brother, but never Gregory. During his closing argument, Gregory's defense counsel attacked the State's reliance on a receipt, found in the room and bearing Gregory's name, as evidence that the room was in fact Gregory's. Defense counsel also argued that other

receipts found in the room—not bearing Gregory’s name—were exculpatory evidence that the State should have but did not turn over.

4. That allegation and the divergent recollections of Gregory’s encounter with the police after the search form the backdrop for this appeal. The prosecution in its summation drew the jury’s attention to the defendant’s version of the disputed police testimony. First, the prosecutor reminded the jury of Gregory’s interest in avoiding conviction, stating in part: “You, ladies and gentleman of the jury, have to evaluate his credibility.” Defense counsel objected, but the court overruled the objection because Gregory had placed his credibility in issue by testifying.

5. Later, the prosecutor described defense counsel as having “tried to re-characterize and alter” Detective Hazzard’s testimony regarding Gregory’s statements to the police. Again, defense counsel objected. This time the court sustained the objection. Finally, the prosecutor told the jury that all “the other issues raised by the defense . . . try to confuse and obscure the evidence, based on the physical evidence.” Again defense counsel objected and the objection was sustained. At a sidebar conference after the summation, defense counsel moved for a mistrial, claiming that the prosecutor had “denigrate[d]” defense counsel by describing his efforts as “obscuring the evidence.” The court agreed that “‘obscure’ is a poor choice of words.” But, because the court had sustained the

objection and the prosecutor did not pursue that line of argument any further, the court denied the request for a mistrial.

6. On appeal, Gregory claims that the Superior Court abused its discretion in refusing to grant a mistrial on the basis of the allegedly improper prosecutorial statements. The standards for reviewing claims of prosecutorial misconduct differ, depending on whether or not defense counsel raised a timely objection at trial. If defense counsel raised a timely objection or the court intervened *sua sponte*, we review for harmless error.¹ If counsel failed to raise a timely objection and the court did not intervene *sua sponte*, we review only for plain error.² Here, defense counsel raised timely objections to each of the allegedly improper statements. Our review is, therefore, for harmless error.³

7. “The first step in the harmless error analysis involves a *de novo* review of the record to determine whether misconduct actually occurred.”⁴ If we determine that misconduct occurred, the next inquiry is whether that misconduct “prejudicially affect[ed] the defendant’s substantial rights,” thereby warranting a

¹ *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

² *Id.*

³ *Id.*

⁴ *Id.* at 148.

reversal and mistrial.⁵ The three-factor test set forth in the *Hughes v. State*⁶ test guides our analysis. We consider the closeness of the case, the centrality of the issue affected by the error and the steps taken to mitigate the effects of the error.⁷ This test is applied in “a contextual, case-by-case, and fact sensitive matter.”⁸

8. Finally, in *Hunter v. State*,⁹ we recognized a fourth factor that could be dispositive even if the three *Hughes* factors are not: whether the misconduct amounts to repetitive errors that cast doubt on the integrity of the judicial process. If this factor is found to exist, the court has discretion to grant a mistrial, although it is not required to do so.¹⁰

9. Gregory argues that prosecutorial misconduct occurred during three discrete portions of the prosecutor’s summation. We review each statement *de novo* to determine if in fact misconduct occurred.¹¹

⁵ *Id.* at 149.

⁶ *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981) (quoting *Dyson v. United States*, 418 A.2d 127, 132 (D.C. Cir. 1980)).

⁷ *Id.*

⁸ *Baker*, 906 A.2d at 149.

⁹ *Hunter v. State*, 815 A.2d 730 (Del. 2002).

¹⁰ *Baker*, 906 A.2d at 149.

¹¹ *Id.*

10. The prosecutor’s closing argument reminded the jury of the inherent bias due to Gregory facing a criminal conviction if his testimony were disbelieved or discounted. Gregory argues that the improper inference to be drawn from that statement is that Gregory “would get up there and fabricate his story to avoid conviction.” In *Hughes* we held that the word “liar” was “an epithet to be used sparingly [by a prosecutor] in argument to the jury.”¹² We also noted that “[s]triking the balance between permissible and impermissible comment by a prosecutor, calls for the exercise of a sound discretion by the Trial Judge.”¹³ The prosecutor should not be permitted to deem a statement a “lie” unless that is a legitimate inference from the evidence, and the prosecutor ties his argument to that evidence. More recently, we held that “[w]here prosecutors fail to provide an evidentiary foundation for their conclusions about the truthfulness of a witness, they impermissibly tip the scales against the defense.”¹⁴

11. We also have repeatedly relied on the American Bar Association Standards for prosecutorial conduct in deciding whether a prosecutor’s statements

¹² *Hughes*, 437 A.2d at 571.

¹³ *Id.*

¹⁴ *Clayton v. State*, 765 A.2d 940, 943 (Del. 2001).

are improper.¹⁵ ABA Standard 3-5.8(b) states that the “prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.” The comments to that standard, promulgated in 1993, elaborate that the “line between permissible and impermissible argument is a thin one. . . . Credibility is to be determined solely by the triers of fact, but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another.”¹⁶

12. In this case, the prosecutor did not directly refer to the defendant as a liar, nor did he use any synonym therefor. Rather, the prosecutor reminded the jury of its duty to weigh the evidence, including negative inferences of bias permissible under the Delaware Uniform Rules of Evidence.¹⁷ The prosecutor did not directly express his personal belief about the truth of Gregory’s testimony, and to the extent he implied a personal belief, the implication was grounded in the

¹⁵ See, e.g., *Baker*, 906 A.2d at 152 (“For over twenty-five years, we have admonished prosecutors to follow the ABA standards governing the prosecution function.”); *Hunter*, 815 A.2d at 735 (“[T]he prosecutor should abide by the American Association’s standards. . . .”). The ABA Standards for Criminal Justice, Prosecution Function and Defense Function, 3rd Ed., 1993, is available at http://www.americanbar.org/groups/criminal_justice/policy/standards/prosecution_function_standards.html.

¹⁶ ABA Standards for Criminal Justice, *supra*, note 15, at 108.

¹⁷ Delaware Uniform Rules of Evidence, Rule 616. See also, *Weber v. State*, 457 A.2d 674, 680 (Del. 1983) (“It is well settled that the bias of a witness is subject to exploration at trial and is “always relevant as discrediting the witness and affecting the weight of his testimony.”) (citation omitted).

evidence and circumstances of the case.¹⁸ For these reasons, the prosecutor's statement was not improper.

13. Gregory claims that twice during the prosecutor's summation, the prosecutor improperly argued that defense counsel had "re-characterize[d]," "alter[ed]," or "obscure[d]" the evidence pointing to Gregory's guilt. First, the prosecutor described Gregory's testimony, which contradicted Detective Hazzard's account of Gregory's statement to the police that marijuana was in his room, as an attempt by the defense to "alter" the testimony. Second, the prosecutor summarized the key evidence in support of the charges against Gregory, and then stated that "[a]ll the other issues raised by the defense . . . try to confuse and obscure the evidence. . . ."

14. The Superior Court upheld defense counsel's objections to both statements. It denied Gregory's motion for a mistrial on the basis of alleged prosecutorial misconduct, however. This Court has adopted the ABA Standards' prohibition against prosecutors denigrating the role of defense counsel,¹⁹ and has held that although "the prosecutor has wide latitude in summation, he or she may not employ argument to denigrate the role of defense counsel 'by injecting his [or

¹⁸ ABA Standards for Criminal Justice, *supra*, note 15, at 108.

¹⁹ *Baker*, 906 A.2d at 152 ("For over twenty-five years, we have admonished prosecutors to follow the ABA standards governing the prosecution function").

her] personal frustration with defense tactics.’’²⁰ We also have held that statements suggesting defense counsel sought to fool or trick a jury were improper under this standard.²¹

15. Although the prosecutor in this case did not use the word “fool,” his comment that defense counsel intended to “confuse and obscure the evidence” constituted a similarly pointed charge to that effect. The fact that defense counsel had argued, perhaps without merit, that the prosecutor had withheld exculpatory evidence in the form of receipts did not justify such broadly phrased denigration of the defense’s case. Therefore, that remark was improper.

16. The prosecutor’s earlier comment, that defense counsel had “alter[ed]” or “re-characterize[d]” Detective Hazzard’s testimony, is less suspect. In his summation, defense counsel argued that Detective Hazzard’s contrary testimony was a “misstatement” of what Gregory had told police. Gregory’s disputed statements were critical to the case. If it was not improper for the defense to describe controverted testimony as a “misstatement,” based on Gregory’s testimony, then it was not improper for the prosecutor to describe counsel’s portrayal of the defense’s version of the facts as a “re-characterization” or

²⁰ *Walker v. State*, 790 A.2d 1214, 1219 (Del. 2002).

²¹ *Hunter*, 815 A.2d at 736.

“alteration.” Gregory insists, however, that that prosecutorial statement improperly denigrated the role of defense counsel.

17. A possible interpretation of the prosecutor’s use of the word “alter,” a synonym for change or modify, is that the prosecutor was claiming that defense counsel intentionally misled the jury by emphasizing Gregory’s contradictory testimony. The word “re-characterize” at least implicitly acknowledges that disputed facts are involved, allowing the same sequence of events to be described in more than one way. Assuming *arguendo* that the trial court properly sustained the defense’s objection and the comment was improper, we still must determine whether under the *Hughes-Hunter* test the (assumed) misconduct should warrant a mistrial.

18. Once a prosecutor’s comment or act is deemed improper, *Hughes* requires a multi-pronged test to determine whether the declaration of a mistrial is warranted. To reiterate, under *Hughes*, we consider the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error.

19. In this case, the overwhelming weight of the evidence favored the State. Gregory himself was first discovered by police in the room where marijuana and related paraphernalia were found. A receipt bearing Gregory’s name was recovered in that room. Although Gregory’s counsel criticized the State’s failure

to gather other receipts that did not have his name on it, the jury could still have reasonably inferred that Gregory would not have kept a receipt in a room in which he did not live. Moreover, a detective testified about Gregory's admission to police at the scene. Although Gregory contests the detective's account, the issue of witness credibility was for the jury to resolve and we will not overturn its credibility judgment. The neighbor's testimony did not disprove that Gregory lived in the apartment. Because the weight of the evidence supported the State's case, the "closeness of the case" factor of the *Hughes* test favors the prosecution.

20. The State acknowledges that Gregory's credibility was a central issue in the case. The comment regarding defense counsel's obscuring the issues in the case, however, is read by the State as intended to rebut defense counsel's claim that certain exculpatory evidence, in the form of receipts, was not properly turned over by police. That issue was argued in defense counsel's summation, at least impliedly as a *Brady*²² violation. Defense counsel does not directly claim on this appeal, however, that a *Brady*²³ violation occurred. Because the issue of the receipts was only tangentially addressed at trial, it cannot be regarded as a central issue in the case.

²² *Brady v. Maryland*, 373 U.S. 83 (1963).

²³ *Id.*

21. To mitigate the prosecutor's improper comments, the trial court sustained objections by defense counsel, causing the prosecutor to shift his line of questioning. We have recognized that that intervention alone may provide sufficient mitigation.²⁴ The State also argues that further mitigation occurred when the Superior Court provided jurors with a general instruction to disregard any personal opinions or beliefs of the attorneys before deliberations. On prior occasions we have rejected the claim that a general jury instruction, given before jury deliberations, adequately mitigates serious prosecutorial misconduct,²⁵ but we need not reach that question here. In this case the trial court's decision to sustain the objections to the two arguably improper comments sufficiently mitigated any possible prejudice.

22. Even where the three *Hunter* factors do not favor a mistrial, we may still order one if the misconduct amounts to repetitive errors that cast doubt on the integrity of the judicial process. Here, in making two improper comments, one only a borderline offense at best, the prosecutor's conduct did not approach the sort of repetitive action deserving of a *Hunter* remand and reversal. In short, the trial court adequately mitigated any harm posed by the two comments it found improper

²⁴ See, e.g., *Donlon v. State*, 243 A.2d 575, 577 (Del. 1972).

²⁵ *Baker*, 906 A.2d at 155 ("If the trial judge had given a curative instruction immediately after the prosecutor's question, had stricken the question, or had sustained the defense's objection at the bench in the jury's presence, the State's argument might have merit.").

and properly overruled defense counsel's objection to the third prosecutorial comment.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice